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IN THE

Supreme Court of the United States

No. 707.

October Term, 1945.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

v.

L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The Statement As To Jurisdiction, filed by the Appellant in this proceeding, sets forth not only the basis of jurisdiction but also in detail the reasons why the judgment of the Supreme Court of the State of South Carolina should be reversed. Facts are clearly stated therein which show that the federal questions involved are substantial; that the tax statutes of South Carolina constitute a direct and unreasonable burden upon interstate commerce in the conduct of Appellant's insurance business; that such discrimination is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States; and that said tax statutes were not within the regulation or taxation contemplated under the McCarran-Ferguson Act.

The Appellant, however, files this brief in answer to the six propositions submitted by Appellee in his brief in support of his Motion to Dismiss or Affirm.

I.

The Appellant has clearly shown that the tax laws of South Carolina unquestionably discriminate against foreign

insurance companies. The facts set forth in Appellant's Petition for Injunction and Equitable Relief make plain this discrimination. Moreover, although the Supreme Court of the State of South Carolina stated in its opinion (a) that said premium tax is "neither a burden upon interstate commerce nor discriminatory against a foreign company", and (b) that "upon the showing made" (namely, statistics in the petition and uncontested by the return which "do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond") "there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the laws of this state, to which it is subject in the conduct of its business here", said statements are contrary to the undisputed evidence and injected an issue in the case that was not warranted by the record. Furthermore, not only are the *ad valorem* property taxes paid by domestic companies neither corresponding nor correlative taxes but also, even if said property taxes be considered corresponding or correlative taxes, there was no evidence that the amount of property taxes paid by domestic companies was sufficient to offset the discrimination of "premium taxes".

Moreover, after said opinion was filed, Appellant forthwith filed a motion in said court for an order which would permit Appellant to file in the record a statement of real estate taxes paid in South Carolina by domestic insurance companies to answer the issue of real estate taxes which had thus been injected into the case and to substantiate still further its claim of discrimination. Said motion was denied.

The cases of *General American Tank Car Corp. v. Day*, 270 U. S. 367 (1926) and *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245 (1928), cited by Appellee, are not

applicable. In the former case, the state tax levied on interstate commerce was in lieu of other taxes levied on intrastate commerce. In the latter case this Court reasoned that the validity of a Connecticut mileage tax against interstate commerce was not a substantially greater burden on interstate commerce than Connecticut's correlative gross receipts tax on comparable intrastate business, and the proceeds from both taxes were expended for the maintenance of Connecticut's highways. In the instant case, domestic insurance companies are not subject to any correlative or corresponding tax.

II.

While corporations whose business includes interstate and intrastate activity may be subject to legal non-discriminatory regulation and taxation by state governments, the Appellant contends herein that such regulation and taxation must not unjustly discriminate against, nor be a burden upon, interstate commerce, as do the South Carolina statutes involved herein.

III.

Sections 7948-7949 of the South Carolina Code do not "place a tax purely on intrastate activity" of the Appellant, as stated by Appellee, even though the tax is based on the premiums received from Appellant's insurance business in South Carolina during the preceding year. As set forth in Appellant's Statement As To Jurisdiction, the tax is on the Appellant's interstate insurance business, even if it be measured by the gross premiums received in the state. A state may not impose discriminatory taxes or licenses upon the privilege of engaging in *interstate* commerce. *Welton v. The State of Missouri*, 91 U. S. 275 (1875); *Hale v. Bimco Trading Co.*, 306 U. S. 375 (1939); *Best & Co. v. Maxwell*, 311 U. S. 454 (1940); *Sprout v. City of South Bend*, 277 U. S. 163, 170-171 (1928).

IV.

Appellant has not claimed in this proceeding that the state tax statutes are in violation of the Fourteenth Amendment. This Court in *Lincoln National Life Insurance Company v. Read*, — U. S. —, 89 L. Ed. 1250 (1945) has already adjudicated that question. Appellant claims herein that the South Carolina tax statues are unconstitutional in that they violate the "commerce clause", Article I, Section 8, Clause 3 of the Constitution of the United States. *Crutcher v. Kentucky*, 141 U. S. 47 (1891); *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90 (1937); *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650 (1936); *Welton v. The State of Missouri, supra; Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Hale v Bimco Trading Co., supra.*

V and VI.

Public Law No. 15, 79th Congress, Chapter 20, 1st Session, (15 U. S. C. A. §§ 1011-1015) known as McCarran-Ferguson Act, does not validate the state premium tax statutes. That Act was not intended to permit, nor could it legally permit, discriminatory regulation or taxation of interstate commerce in the conduct by the Appellant of its insurance business in South Carolina. *Welton v. The State of Missouri, supra; Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887); *Scott v. Donald*, 165 U. S. 58 (1897).

The cases cited by Appellee are neither in point nor determinative of the effect of the McCarran-Ferguson Act. In *International Shoe Company v. State of Washington*, — U. S. — (October Term, 1945, No. 107, decided December 3, 1945) the enabling act of Congress specifically stated that a person was not relieved from compliance with state unemployment tax statutes because engaged in interstate commerce and the state statute under review does not appear to have differentiated between intrastate and interstate business. *Southern Pacific Company v. State of Ari-*

zona, — U. S. —, 89 L. Ed. 1469 (1945) likewise is inapplicable on its facts. Furthermore, your Honorable Court in this case, just as in the *Southern Pacific Company* case, should be the final arbiter between the competing demands of state and national interest after a full and complete review of the important questions involved. Similarly, *Standard Dredging Corporation v. Murphy*, 319 U. S. 306 (1943), merely held that, even though the Federal Unemployment Tax Act (26 U. S. C. A. §§ 1600-1611) exempted employers of maritime employees working on vessels on navigable waters, such exemption did not relieve them from state unemployment insurance taxes. Likewise, in *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148 (1942) this Court in construing conflicting state and federal statutes was required to decide whether federal legislation supervising the manufacture of renovated butter superseded and made inoperative a state statute on the same subject matter.

In the instant case, the McCarran-Ferguson Act merely evidences Congressional intent to allow such continued regulation by the states as is not discriminatory against foreign insurance companies, and to give to insurance companies a period of grace in which to adjust any intercompany relationships and cease any violation of the Sherman Act. Congress had no intention of superseding the police-power regulations of the states with regulations of its own, and never intended to validate tax statutes which unjustly discriminated against interstate commerce of foreign insurance companies.

Conclusion.

This appeal presents a most important constitutional question which directly affects the business of insurance throughout the United States which has not herebefore been decided by this Court and which Appellant maintains has been erroneously decided by the Supreme Court of South Carolina.

BRIEF FOR THE APPELLANT

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"Certainly there cannot but be serious doubt as to the validity of state taxes which may now be thought to discriminate against the interstate commerce."

STONE, C. J., in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 581 (1944).

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Appellant;

v.

L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR APPELLANT.

This case comes before the Court on appeal from a final judgment of the Supreme Court of the State of South Carolina.

OPINIONS BELOW.

The per curiam opinion of the Supreme Court of the State of South Carolina was filed on September 13, 1945, and appears on page 18 of the Record. It is not yet reported in the South Carolina Reporter but is reported in 35 S. E. (2d) 586.

JURISDICTION.

The jurisdiction of this Court to review the final judgment of the Supreme Court of the State of South Carolina is provided by Section 237 of the Judicial Code (28 U. S. C. A. § 344) under which a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had (wh[illegible] is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the

decision is in favor of its validity) may be reviewed by the Supreme Court of the United States by writ of error. By Act of January 31, 1928, c. 14 § 1; 45 Stat. 54 (28 U. S. C. A. § 861a) the remedy by appeal has been substituted for writ of error in such cases.

The statutes of the State of South Carolina, which the Appellant contends are repugnant to the Constitution of the United States, are Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, (Volume 4, Chapter 157, Article 1, pp. 594-596). These statutes (which the Supreme Court of South Carolina has declared valid) provide, *inter alia,* that each foreign insurance corporation must annually pay taxes in the aggregate amount of three (3%) per cent. of the premiums received from its insurance business in South Carolina during the preceding year (less minor reductions in the event the foreign corporation invests its reserve in South Carolina securities or property) and that domestic insurance corporations are exempt from said taxes.

STATEMENT OF THE CASE.

Are Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942,[1] constitutional which imposes taxes on the Appellant, a foreign insurance corporation, in the aggregate amount of three (3%) per cent. of the insurance premiums received from Appellant's insurance business in South Carolina during the preceding year, less minor reductions in the event of certain investments? Said statutes further provide that payment of said taxes is a condition precedent to Appellant's obtaining a certificate of authority to transact its insurance business in South Carolina.

Subsequent to the decision of this Court in the case of *United States v. South-Eastern Underwriters Association,* 322 U. S. 533 (1944), in which insurance business as transacted by the Appellant herein was held to be interstate com-

1. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, are set forth verbatim on pages 61 to 64 in the Appendix hereto.

merce, The Prudential Insurance Company of America, a corporation organized under the laws of the State of New Jersey, with its principal office located at Newark, New Jersey, requested the Insurance Commissioner of the State of South Carolina to issue to it certificates of authority to do its business in said state during the insurance year of 1945-1946 without the payment by Appellant of South Carolina taxes as provided in the aforesaid Sections 7948 and 7949. (R. 8, 16.) The request was based on the ground that the laws which imposed said taxes (from which domestic insurance companies were exempt) were unconstitutional in that, *inter alia*, they violated the commerce clause, to wit, Article I, Section 8, Clause 3 of the Constitution of the United States. The Insurance Commissioner declined the request and demanded payment of the said taxes as the condition for issuing its certificates of authority. (R. 8, 16.)

The Appellant then filed in the Supreme Court of the State of South Carolina a Petition for Injunction and Equitable Relief and obtained on March 29, 1945 a rule on said Insurance Commissioner to show cause why he should not be enjoined and restrained from collecting said taxes and from revoking or suspending Appellant's certificate of authority for its failure to pay said taxes. (R. 1.)

The following facts were averred by the Appellant in its petition:

The Appellant commenced its insurance business in 1875, and has been authorized to do business in South Carolina since 1897. (R. 2, 5.) It is engaged exclusively in the business of issuing all forms of life insurance, group insurance, and annuity contracts. (R. 2.)

All the business and operations of the Appellant are conducted by its Board of Directors and executive management at and from its Home Office in Newark, New Jersey, and radiate from that office into all of the forty-eight states of the United States, the District of Columbia, the Territory of Hawaii, and the Dominion of Canada. (R. 2.)

The Board of Directors meets only at the Home Office of the Appellant in New Jersey, and all the executive officers of the Appellant are located and act as such at said Home Office. (R. 2.) Field representatives of the Appellant (by which is meant its entire agency selling force and all its representatives and employees outside its Home Office) have no authority to transact business independently on behalf of the Appellant, but may only take such action and perform such duties as are specifically authorized by the executive officers of the Appellant acting at the Home Office in New Jersey. (R. 2, 3.)

Policies insuring the lives of persons are issued by the Appellant at the present time in various forms, including Life, Endowment and Term insurance, and cover various fields of insurance, including Ordinary, Group and Industrial. Annuity contracts issued by the Appellant at the present time include both immediate and deferred annuities. (R. 3.) On December 31, 1944, the Appellant had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives. (R. 3.) During the year 1944 the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of $2,668,714,022; and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000 on such lives. (R. 3.) During the year 1944 the Appellant collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45; and it paid out $13,690,781.93 on annuity contracts. (R. 3.)

The terms and conditions of all types of insurance policies and annuity contracts are determined by the officers of the Appellant and their assistants at the Home Office. (R. 3.) Applications for insurance policies, an-

nuity contracts, and other miscellaneous matters pertaining thereto, are received by agents operating in the territory in which the applicant resides. (R. 3.) Medical examinations and investigations of prospective risks are made by local physicians and investigators. (R. 3.) All applications and reports are transmitted by its agents from the states in which they are received, by mail, telegraph and telephone, across state lines to the Home Office in Newark, New Jersey, where they are considered and acted upon, and where all contracts and policies are executed and issued. (R. 3.) After issuance, policies of insurance and annuity contracts are transmitted from its Home Office across state lines to its respective agents for delivery to the insured. (R. 3.)

The investments made by the Appellant are governed by detailed statutes of the State of New Jersey and, subject to those statutes, are rigidly controlled by the Board of Directors of the Appellant acting at its Home Office in New Jersey, which specifically authorizes every investment made by the Appellant. (R. 4.) In addition, the Appellant maintains cash balances in 514 banks and trust companies located throughout the United States and the Dominion of Canada. (R. 4.) All the Bank deposits hereinabove referred to are subject to the control of the Board of Directors and the executive officers of the Appellant acting at its Home Office in Newark, New Jersey; all the securities purchased by the Appellant, including mortgages, but excepting (during wartime) Canadian securities, are delivered to it in the State of New Jersey and physically kept in the vaults of the Appellant at the Home Office in Newark, New Jersey (except securities deposited with governmental authorities as required by law or in connection with court proceedings), and are subject to the exclusive control and management of the Board of Directors and the executive officers of the Appellant acting at the Home Office in New Jersey. (R. 4.) As of December 31, 1944, the assets of the Appellant amounted to $5,856,880,814.84. (R. 4.)

The performance of the life insurance and annuity contracts, and the operation of the life insurance business of the Appellant in all its manifold phases, require the movement of information, documents and money on a large scale across state lines. (R. 4.) During the year 1944 the Appellant expended approximately $1,277,000 for postage, telephone, telegraph and express services, approximately $351,000 for traveling expenses, approximately $475,000 for advertising in magazines circulating throughout the United States, and approximately $900,000 in radio programs broadcast throughout the nation. (R. 4.) Inherent in the Appellant's business is the continuous use of the channels of interstate commerce for the transmission of such information, documents and money. (R. 4, 5.)

The Appellant, which was originally authorized to do business in the State of South Carolina, under license issued pursuant to the laws of said State, in the year 1897, has since that time received annual renewals of its said license whereby it has been authorized to do business in that state up to and including March 31, 1945. (R. 5.) On December 31, 1944, the Appellant maintained 4 District Offices in the State of South Carolina, employed 12 persons in said Offices and had contracts with 21 agents engaged in selling insurance therein. (R. 5.) At that time the Appellant had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of $30,827,184.00. (R. 5.) During the year ending December 31, 1944, 1,439 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of $1,475,062.00 were issued, and $457,602.28 in claims were paid on policies covering the lives of residents. (R. 5.) All the business in which the Appellant is now engaged in the State of South Carolina, and all the business which the Appellant has done in such State in the past, has been of the nature and performed in the manner hereinabove set forth in the preceding paragraphs. (R. 5.) All such business has been and is interstate commerce. (R. 5.)

The taxes provided for under the aforesaid Sections 7948 and 7949 are illegal and void (and the aforesaid statutes under which they are imposed are unconstitutional) in that they violate, *inter alia*, Article I, Section 8, Clause 3 of the Constitution of the United States not only by imposing a direct and unreasonable burden upon, interference with, or regulation of interstate commerce in the conduct of Appellant's business but also by illegally and unjustly discriminating against interstate commerce of foreign insurance companies like the Appellant and in favor of local commerce of South Carolina domestic insurance companies, which are specifically exempt from said taxes and are not subject to any correlative, corresponding, equivalent, or similar tax or taxes.

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2. Compare these facts with the statement of Mr. Justice Black on page 539 of the *South-Eastern Underwriters* case in which he described the commanding position which the modern insurance business holds in the trade and commerce of the nation,

"The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most most important branches of commerce. Its total assets exceed $37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed $6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

"This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state."

The discrimination against the interstate commerce of the Appellant was further shown by a schedule, attached as Exhibit A[3] comparing the taxes demanded of Appellant under the Sections 7948 and 7949 with the taxes required of the five most comparable domestic insurance companies. (R. 7, 8, 10.)

3. EXHIBIT A

COMPARISON OF PREMIUM AND OTHER TAXES PAID TO THE STATE OF SOUTH CAROLINA ON 1943 AND 1944 BUSINESS BY THE PRUDENTIAL AND BY THE FIVE LARGEST SOUTH CAROLINA DOMESTIC LIFE INSURANCE COMPANIES

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
	1943 South Carolina Premiums Column #1 Schedule T Life and Casualty *	State Premium Tax Thereon	1944 South Carolina Premiums Column #1 Schedule T Life and Casualty *	State Premium Tax Thereon	All Other State or Local Taxes Paid in 1944 †	Total of Column 2 and Column 5	Total of Column 4 and Column 5
The Prudential Insurance Company of America	$ 858,915.82	$18,496.87	$ 876,305.61	$19,676.94	$ 3,103.92	$21,600.79	$22,780.86
Liberty Life Ins. Co.	5,339,320.20	—0—	6,164,600.50	—0—	13,178.40	13,178.40	13,178.40
Carolina Life Ins. Co.	1,748,356.86	—0—	2,028,153.03	—0—	12,171.75	12,171.75	12,171.75
Atlantic Coast Life Insurance Company	937,055.99	—0—	1,182,037.72	—0—	1,618.35	1,618.35	1,618.35
Palmetto State Life Insurance Company	931,768.12	—0—	1,060,275.58	—0—	5,960.30	5,960.30	5,960.30
Capitol Life and Health Insurance Company	500,761.13	—0—	783,675.84	—0—	2,975.18	2,975.18	2,975.18

* Figures taken from annual statement on file in South Carolina Insurance Department.

† These figures include, for the South Carolina companies, social security taxes and taxes paid in other states in which the respective companies are doing business, which your petitioner was unable to eliminate from the figures given in the annual statements. They do not include real estate taxes.

As there was no provision in the law of South Carolina permitting the Appellant to pay said taxes under protest and to sue for the recovery thereof, it was necessary for the Appellant to institute the proceedings it did. (R. 8.) However, in addition to seeking equitable relief, the Appellant also filed the Returns required under said sections and asked leave to deposit with the Clerk of said Court moneys in the amount of taxes involved to abide the determination of this cause. (R. 9.)

The Supreme Court of the State of South Carolina granted the requested rule to show cause, and the Appellant deposited with the Clerk of said Court its certified checks in the amount of $20,936.69 representing the amount of taxes involved.

The Insurance Commissioner of the State of South Carolina thereupon filed two pleadings in answer to Appellant's Petition: (1) a Demurrer, and (2) a Return to Rule to Sho Cause and Reply to Petition. (R. 11, 13.)

In the Demurrer he maintained that the Appellant had not set up a cause of action in said Petition for four reasons: (1) the payment of said taxes was a proper condition precedent to the granting of privilege of doing business within the state; (2) the tax was not an unlawful burden on interstate commerce and was valid under the McCarran-Ferguson Act (15 U. S. C. A. §§ 1011-1015); (3) the tax was not discriminatory, but was one which all foreign insurance companies were required to pay; and (4) the action was against the State and without its permission. (R. 11-13.)

In the Return to Rule to Show Cause and Reply to Petition, the Insurance Commissioner denied that the business of the Appellant constituted interstate commerce; that there was any illegal discrimination against Appellant; and that the taxes created a burden on interstate commerce. (R. 14, 15, 16.) He also affirmatively averred therein that the state in the exercise of its police power could impose said taxes; that said taxes were valid "privilege taxes"

and that said taxes were further validated by the McCarran-Ferguson Act. (R. 14, 15, 16, 17.)

The case was submitted to the Supreme Court of South Carolina on the basis of the aforesaid pleadings, and, after argument, said Court on September 13, 1945, filed its opinion in which it upheld the constitutionality of said statutes, dismissed said petition, discharged said rule, dissolved the temporary restraining order theretofore filed and denied a permanent injunction. (R. 18, 29.) On that date, judgment was entered in favor of the Insurance Commissioner and against the Appellant as set forth in the opinion. (R. 29.)

On September 24, 1945, a petition for rehearing was filed by appellant. (R. 29.)

Since the Supreme Court of the State of South Carolina in its opinion [4] injected an issue in the case with respect to taxation of domestic insurance companies which was contrary to and unsupported by the undisputed evidence, the Appellant presented on October 1, 1945 a motion for an order permitting Appellant to file in the record of this proceeding (pending determination of its petition for rehearing) a statement of real estate taxes paid in South Carolina by domestic insurance companies. (R. 35.) Not only were the *ad valorem* property taxes referred to in said opinion as paid by domestic companies neither corresponding nor correlative taxes but, even if said property taxes were to be considered corresponding or correlative, the Appellant desired to show by said statement that the amount

4. "It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax which petitioner resists for the first time, and so far apparently alone among the many nonresident insurance companies operating in the state, may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a 'foreign' company. such as petitioner, and in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by the petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies." (R. 22)

of property taxes paid by domestic companies did not offset the discrimination of said "premium taxes". (R. 35, 36.) Said motion, however, was refused by the Court on October 8, 1945. (R. 36.)

On October 22, 1945, the Appellant's Petition for Rehearing was denied. (R. 34.)

Subsequently, L. George Benjamin, who in the meantime had succeeded D. D. Murphy as Insurance Commissioner, was substituted in his official capacity of Insurance Commissioner in place of said D. D. Murphy by appropriate order of the Supreme Court of the State of South Carolina, dated November 19, 1945. (R. 37.)

The Appellant thereafter filed on November 30, 1945, with the Supreme Court of the State of South Carolina, its Petition for Appeal, together with its Assignment of Errors and Statement as to Jurisdiction, and a cost bond having been submitted for the Court's approval, said Court under said date entered its Order Allowing An Appeal to this Court and approving the filing of the cost bond submitted. (R. 37, 40, 43, 44.)

The Appellee under date of December 14, 1945, filed his Motion to Dismiss or Affirm and Brief in support thereof.

On December 31, 1945, the within appeal was docketed in this Court by the Appellant, and on January 2, 1946, the Appellant filed its Brief in Opposition to Motion to Dismiss or Affirm.

On January 28, 1946, this Court entered an order noting probable jurisdiction. (R. 47.)

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The Appellant, in compliance with Rule 13 (9) of this Court, filed its Statement of the Points On Which It Intends to Rely wherein it adopted *in toto* its Assignments of Error (R. 40) as the Statement of Points On Which It Intends to Rely. (R. 47.)

The Appellant intends to urge each of the errors heretofore filed and claimed in its Assignments of Error, namely:

(a) Those concerning the question whether the business of insurance when transacted across state lines is interstate commerce and whether the Appellant's insurance business in South Carolina is interstate commerce, to wit: Assignments of Error Nos. 1 and 10 (R. 40, 43).

(b) Those concerning the question whether the South Carolina "premium tax" statutes illegally and unjustly discriminate against the interstate commerce of Appellant and in favor of local commerce of South Carolina domestic insurance companies in violation of the commerce clause of the Constitution, to wit: Assignments of Error Nos. 3 and 10 (R. 41, 43).

(c) Those concerning the question whether the South Carolina "premium tax" statutes impose a direct and unreasonable burden upon, interference with, and regulation of interstate commerce in violation of the commerce clause of the Constitution, to wit: Assignments of Error Nos. 2 and 10 (R. 40, 43).

(d) Those concerning the statements by the Supreme Court of South Carolina in its opinion that the premium tax was not a burden on interstate commerce and that the premium tax was not discriminatory and also concerning said Court's refusal to permit Appellant to file a statement of real estate taxes paid in South Carolina by domestic insurance companies, to wit: Assignments of Error Nos. 8, 9, and 10 (R. 42, 43).

(e) Those concerning the question whether the McCarran-Ferguson Act was intended to permit discriminatory regulation and taxation of interstate commerce and whether, if intended to permit discriminatory regulation and taxation of interstate commerce, said Act is invalid and in violation of Article I, Section 8, Clauses 1 and 3 of the

Constitution, of Article I, Section 1 of the Constitution, and of the Fifth Amendment to the Constitution, to wit: Assignments of Error Nos. 4, 5, 6, 7 and 10 (R. 41, 42, 43).

SUMMARY OF ARGUMENT.

The sole issue involved in this case is a discriminatory tax in favor of domestic intrastate commerce and against interstate commerce. Appellant does not challenge the power of a state to impose reasonable and non-discriminatory taxes, nor does it challenge the right of a state to subject Appellant to reasonable and non-discriminatory police power regulations.

The issue of discrimination, in this case, involves the following points:—

1. That the insurance business in which Appellant is engaged, including its business in South Carolina, is interstate;

2. That the South Carolina statutes which discriminate against interstate commerce in favor of domestic intrastate commerce are invalid; and

3. That such invalidity is not cured, nor was it intended to be cured, by the McCarran-Ferguson Act.

Argument.

I. THE APPELLANT'S INSURANCE BUSINESS IN SOUTH CAROLINA CONSTITUTES INTERSTATE COMMERCE.

(*Assignments of Error Nos. 1 and 10.*)

In *United States v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533 (1944), this Court has held that the business of insurance when transacted across state lines constitutes interstate commerce.

The Supreme Court of the State of South Carolina so held when the present litigation was pending before it, because it stated at the very beginning of its opinion:

> "For a great many years, perforce the decision of the Supreme Court of the United States in Paul v. State of Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, the transaction of the business of insurance across state lines was not interstate commerce and, therefore, was not subject to the control of Congress. 29 Am. Jur., Insurance, Sec. 35. This longstanding status was upset by the result of the recent case of *United States v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440. Overruling the earlier case, *the latter held that when the insurance business crosses state boundaries, it is interstate commerce.*" (R. 18.) (Italics ours.)

The facts set forth in Appellant's Petition for Injunction and Equitable Relief (to which the Appellee demurred) are similar to those considered by this Court in the *South-Eastern Underwriters* case and clearly establish that the Appellant's insurance business in South Carolina constitutes interstate commerce.

In the *South-Eastern Underwriters* case this Court in the majority opinion adverted to certain aspects of the business of the insurance companies in that case as estab-

lishing not only that such business constituted commerce but also that it was interstate commerce.

This Court, speaking through Mr. Justice Black, first referred to the commanding position which modern insurance business holds in the trade and commerce of our nation and that "it has become one of the largest and most important branches of commerce."

There can be no doubt of the position which the Appellant holds in the insurance business of our nation. The Appellant's assets on December 31, 1944 amounted to $5,856,880,814.84, and had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075 and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives (R. 3, 4, 13.) During that year the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons in the total amount of $2,668,714,022 and entered into 451 annuity contracts which provided for an annual income of approximately $150,000 on the lives of 600 persons, and also collected the sum of $681,052,095.07 as premiums on insurance policies and paid out the sum of $246,776,197.45 as claims on policies and the sum of $13,690,781.93 on its annuity contracts (R. 3, 13).

Next, the Court in the *South-Eastern Underwriters* case referred to the multi-state aspect of the insurance business, pointing out particularly that "the business is not separated into 48 distinct territorial compartments which function in isolation from each other." (P. 541.) The Appellant's insurance business fits that description. It radiates from its Home Office at Newark, New Jersey, where all of its business and operations are conducted by its Board of Directors and its executive management, into all the forty-eight states, the District of Columbia, the Territory of Hawaii and the Dominion of Canada (R. 2, 13).

The Court further referred to the fact that this multi-state insurance business not only is centrally operated by

the various companies through their respective home offices, but also to the fact that the insurance companies are continuously required by the very nature of their business to use the facilities of interstate commerce, such as the mails, telegraph, telephone, and express services. Identical facts have been established in this case with respect to the Appellant's business. (R. 2, 3, 4, 13.)

Although applications for insurance policies, annuity contracts, and other miscellaneous matters pertaining thereto, are received by agents operating in the territory where the applicant resides, and although medical examinations and investigations of prospective risks are made by local physicians and investigators, these persons have no authority to transact business independently on behalf of the Appellant, but may only take such action and perform such duties as are specifically authorized by the executive officers of the Appellant acting at the Home Office in New Jersey (R. 3, 13). All applications and reports are transmitted by mail, telegraph and telephone across state lines to the Home Office at Newark, New Jersey, where they are considered and acted upon, and where all contracts and policies are executed and issued (R. 3, 13). After issuance, the policies of insurance and annuity contracts are transmitted from Appellant's Home Office across state lines to its respective agents for delivery to the insured (R. 3, 13). The Appellant paid in 1944 for the use of facilities of interstate commerce the sum of approximately $1,277,000. covering postage, telephone, telegraph and express services. (R. 4, 13.) It also paid that year the sum of approximately $475,000. for traveling expenses. (R. 4, 13.)

Finally, the Court in the *South-Eastern Underwriters* case referred on page 541 to the "continuous and indivisible stream of intercourse among the states composed of collection of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts." The same "continuous and indivisible stream of intercourse

among the states'' exists in this case, for, as above set forth, the nationwide operation of the Appellant's insurance business in all its manifold phases requires the movement of information, documents and money on a large scale across state lines. The same situation exists in South Carolina, where the Appellant conducted its business in 1944 through four district offices and twenty-one agents. (R. 5, 13.) During that year the Appellant issued from its home office 1439 policies insuring the lives of approximately 1000 persons resident in the state for a total amount of $1,475,062.00 and paid claims in the amount of $457,602.28. (R. 5, 13.) The Appellant on December 31, 1944, had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in South Carolina for a total amount of $30,827,184. (R. 5, 13.) The transactions involved in all these policies were an integral part of a "continuous and indivisible stream of intercourse among the states."

Likewise matters of banking and advertising (essential factors of the insurance business) not only are of considerable magnitude but form a part of the great stream of interstate commerce. The Appellant maintains throughout the United States and the Dominion of Canada, subject to the control of its Board of Directors and executive management at Newark, New Jersey, cash balances in 514 banks and trust companies. (R. 4, 13.) Each year it spends large sums of money in national advertising, and during 1944 for example, expended approximately $475,000. for advertising in magazines circulating throughout the United States and approximately $900,000. in radio programs broadcast throughout the nation (R. 4, 13).

No other branch of commerce is more fundamentally interstate in its nature than insurance. The very rates upon which it subsists are established not on the experience of one state but on the average of all states. The law of averages and the theory of diversification and distribution of risk are the basis of the business of life insurance. The insurance written in the Appellant's home state is small in

comparison to its interstate business which produces the majority of its premium income.

Even as to the few activities which the state might maintain were local in character, such as the collection of premiums, medical examinations, and the like, it is impossible to divorce such activities from the extra-state aspects since they are but local incidents of the "continuous and indivisible stream" of interstate commerce managed and supervised from the Appellant's home office in New Jersey. While the minor activities of local agents in the conduct of Appellant's business (when separated from the other aspects of the Appellant's business) might superficially appear to be of a local nature, they are not so, and especially when their relationship to other aspects of the company's insurance business is analyzed. As stated by Mr. Justice Black in the *South-Eastern Underwriters* case:

> "Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business." (p. 541)

The Court must examine the entire transaction of which such local activities are "but a part, in order to determine whether there may be a chain of events which becomes interstate commerce."

> "In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce." (p. 547)

Thus there can be no questioning that in accordance with the holding in the *South-Eastern Underwriters* case, as well as in fact, the Appellant's business in South Carolina clearly constitutes interstate commerce.

II. SECTIONS 7948 AND 7949 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1942, VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES IN THAT THEY ILLEGALLY DISCRIMINATE AGAINST APPELLANT'S INTERSTATE INSURANCE BUSINESS IN SOUTH CAROLINA.

(*Assignments of Error Nos. 3 and 10*)

Sections 7948 and 7949, which are set forth verbatim in the Appendix hereto (pages 61-64), provide, in substance, as follows:—

Section 7948.

"*In addition to the annual license fees now provided by law,* the commissioner shall require each *foreign life insurance company* . . . to pay as an additional and graded license fee an amount equal to two per centum on the total premiums, i. e., total premium income or total premium receipts from the State," less dividends and bonuses paid to residents of the state, but with the further provision if the foreign insurance company invest in certain South Carolina securities or property to the extent of at least one-quarter of the reserve on all policies issued in South Carolina, then the rate shall be one and three-fourths per cent; "if said investments be one-half of said reserves, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said reserve, the additional license fee shall be one and one-fourth per centum, and if the entire reserve be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent." Other types of insurance companies are required to make similar payment. If a return is not made, "the insurance commissioner may suspend the license of the company until such returns are made. The attorney general shall bring suit in the name of the

State to collect any unpaid portion of license fees." (Italics ours.)

Section 7949.

"The Insurance Commissioner of South Carolina is hereby directed to require all *insurance companies* doing business in this State, including all domestic companies . . . of any class licensed by such insurance commissioner and not incorporated under the laws of South Carolina, to pay, in addition to the annual license fee now provided by law, a graduated licensed fee in an amount equal to one (1%) per cent of the total premiums collected in the State, less return premiums for cancellations on risks: PROVIDED, that the terms hereof shall not apply to domestic insurance companies; * * *"

"This Section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws but is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for state purposes." (Italics ours.)

These two sections upon examination disclose a "calculated discrimination against foreign commerce" and, are unconstitutional because they violate the commerce clause.

Section 7948 provides that the Appellant, a *foreign* life insurance company, must pay, *in addition to the annual license fees now required by law,* an additional tax in an amount equal to two per cent of the premiums received by Appellant from its insurance business in South Carolina during the preceding year less certain deductions if Appellant had invested portions of its reserve in South Carolina securities or property.

Section 7949 imposes an *additional* tax on all insurance companies, *except domestic insurance companies,* in an amount equal to one per cent of the premiums received in South Carolina during the preceding year.

Thus the gross premium tax to which foreign insurance companies, like the Appellant, are subjected and from which domestic insurance companies are specifically exempt, amounts to three per cent of the premiums received in South Carolina in the preceding year, which tax can only be reduced fractionally as aforesaid.

It is thus evident on the face of the very statutes themselves that foreign insurance companies are subjected to a very real and substantial discrimination in their local competition with South Carolina domestic insurance companies —an economic disadvantage in the form of a protective tariff which the several states have been prohibited by the commerce clause from imposing on foreign companies engaging in interstate commerce.

That there is discrimination is, also, established by the pleadings. Appellant alleged in paragraph twelve of its Petition for Injunction and Equitable Relief that:

> "The taxes provided for under Sections 7948 and 7949, referred to in the two preceding paragraphs, are levied solely against foreign Insurance Companies, domestic Insurance Companies being specifically exempted therefrom; and there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of." (R. 6.)

The Insurance Commissioner, in his Return to Rule to Show Cause and Reply to the Petition, did not deny the aforesaid allegations which had the effect of an admission and further, he affirmatively alleged in paragraph four of his Return as follows:

> "Replying to the allegations of the 12th paragraph of the petition, the respondent, D. D. Murphy, Insurance Commissioner of the State of South Carolina, admits that the State of South Carolina, acting within its sovereign capacity as a state and in the exercise of its police power, has under the provisions of Sections 7948 and 7949 of the Code of Laws of South Carolina,

1942, levied upon the petitioner, and all foreign insurance companies seeking to do business in the State of South Carolina, as a class, the tax therein provided for as a condition precedent to their being permitted to conduct an insurance business within the State. He admits further that said tax is not levied upon domestic insurance companies of this state, which companies constitute an entirely different class from that of foreign insurance companies doing business in this state." (R. 14.)

Not only is discrimination apparent on the face of the statutes and the pleadings but it is also apparent from a comparison of the taxes which the Appellant has to pay with the taxes paid to the State of South Carolina by the five largest South Carolina domestic life insurance companies. These figures are tabulated in a schedule which was attached to Appellant's Petition for Injunction and Equitable Relief as "Exhibit A." This schedule is not only found on page 10 of the Record but is also reprinted as a footnote on page 8 of this brief.

According to this schedule in 1944 the Appellant and the five South Carolina companies received premiums on insurance written in that state in the following amounts:

The Prudential Insurance Company of America	$876,305.61
Liberty Life Ins. Co.	6,164,600.50
Carolina Life Ins. Co.	2,028,153.03
Atlantic Coast Life Insurance Company	1,182,037.72
Palmetto State Life Insurance Company	1,060,275.58
Capitol Life and Health Insurance Company	783,675.84

The Appellant paid a premium tax of $19,676.94. The five South Carolina companies were completely exempt and paid no premium tax. If these South Carolina companies paid similar gross premium taxes, they would have been required to pay, respectively, $184,938.02, $60,844.59, $35,461.13, $31,808.27, and $23,510.28, less the statutory pro-

portionate deductions if the reserves were invested in South Carolina securities or property.

Similarly, as shown in said schedule, the Appellant paid in 1943 a premium tax of $18,496.87 while the aforesaid South Carolina companies paid no premium tax.

The discrimination has required the Appellant to pay the aforesaid taxes while South Carolina companies make no corresponding payment.

The foregoing demonstrates the existence of the discrimination and its amount against Appellant, and in favor of the South Carolina domestic insurance companies. The impact of the ultimate burdens (and benefits) of the discrimination is made clear by the following: Under the accounting practices prescribed by the various state insurance commissioners, premium taxes are uniformly treated as a general operating expense. This means that all premium taxes paid to all states in which a company may be doing business are aggregated and distributed pro rata to all those entitled to the "equity" in the company, i. e., in a mutual company they appear as a factor increasing the cost of insurance to all the policyholders; and in a stock company they appear as a factor reducing dividends to stockholders. South Carolina, by discriminating as she has, therefore increases the cost of insurance to all policyholders, wherever resident and including South Carolinians, who place their insurance with an out-of-state company; and on the other side, increases the profits available for dividends of the South Carolina companies, most of which are stock companies.

This Court has repeatedly held that the several States may not enact legislation which discriminates against interstate commerce and in favor of local or intrastate commerce.

The commerce clause, which carries an implied prohibition against state legislation discriminating against interstate commerce, was inserted in the Constitution to remedy one of the great and glaring weaknesses of the Confedera-

tion, i. e., the commercial rivalry among the states which threatened to destroy the new Nation through taxes and trade barriers discriminating against commerce of the sister states and in favor of local commerce.

> "We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation'. Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 522 (1935).

See also *Welton v. The State of Missouri*, 91 U. S. 275, 280, (1875).

Thus, the commerce clause (which carries an implied prohibition against state legislation discriminating against the commerce of other states) was incorporated into the Constitution for the purpose of remedying one of the defects of the Confederation. As stated by James Madison, want of authority in Congress had led to an exercise of power separately by the states which not only proved abortive but engendered rival, conflicting, and angry regulations. Moreover, while no mention of discrimination can be found in the debates of the Constitutional Convention, it seems quite clear that the object and result of inserting the supremacy clause in the Constitution was to make it impossible for a state to encroach on the legislative right of the national government and that the insertion of the clause rendered unnecessary the actual writing of a prohibition into the commerce clause for the protection of that government prerogative.

> "The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the peo-

ple of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.". *United States v. South-Eastern Underwriters Association*, supra at 552.

In *Best & Company, Inc. v. Maxwell*, 311 U. S. 454, 455 (1940) Mr. Justice Reed in an unanimous decision declared that "the commerce clause forbids discrimination, whether forthright or ingenious" and cited in support thereof the cases of *Welton v. The State of Missouri, supra; Guy v. Baltimore*, 100 U. S. 434 (1879); *Webber v. Virginia*, 103 U. S. 344 (1880); *Hale v. Bimco Trading Co.*, 306 U. S. 375 (1939); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940); *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887).

A review of some of those and other leading cases will show conclusively that "the commerce clause forbids discrimination" and that a statute which discriminates against interstate commerce is unconstitutional.

In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), a New York statute prohibited the sale of milk imported from another state unless the milk dealer first obtained a license. To get this license the milk dealer had to sell the imported milk at the same price as established for milk produced in New York. The statute was held unconstitutional. Mr. Justice Cardozo pointed out that the statute could not be sustained as a valid exercise of police power and that interstate commerce was unjustly discriminated against, saying on page 527:

"Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against com-

petition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result."

Later in *Hale v. Bimco Trading Co.*, 306 U. S. 375 (1939), this Court considered the constitutionality of a Florida statute which imposed an inspection fee upon imported cement from which inspection and fee domestic cement was exempt. The inspection fee was admittedly found to be sixty times greater than the actual cost of inspection. Although the alleged purpose of the statute, as set forth in the preamble of the statute, was to keep inferior cement out of the state for the protection of domestic cement, this Court held that there was no justification for such discriminatory action against foreign cement, saying through Mr. Justice Frankfurter on page 380:

"That no Florida cement needs any inspection while all foreign cement requires inspection at a cost of fifteen cents per hundredweight is too violent an assumption to justify the discrimination here disclosed. The other justification—the competitive effect of foreign cement in the Florida market—is rather a candid admission that the very purpose of the statute is to keep out foreign goods. The Supreme Court of Florida gives no reason resting in local conditions for what appears to be a transparent discrimination in the imposition of heavy inspection fees as between imported and domestic cement, and none has been offered by appellants. The context of a particular statute may justify distinctive treatment of phases of interstate or foreign commerce. The circumstances may negative apparent discrimination in the difference of treatment. . . . According the statute every presumption of

validity, no reasonable conjecture can here overcome the calculated discrimination against foreign commerce.

". . . But it would not be easy to imagine a statute more clearly designed than the present to circumvent *what the Commerce Clause forbids.*" (Italics ours.)

Best & Company, Inc. v. Maxwell, 311 U. S. 454 (1940), was an appeal from the Supreme Court of North Carolina wherein that court had denied the petition for refund filed by a New York merchandise establishment. The state had levied an annual privilege tax of $250. on every person, not "a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders." North Carolina merchants doing similar business were only required to pay an annual tax of $1.00. The statute was discriminatory against interstate commerce and, therefore, in violation of the commerce clause, which, as stated by Mr. Justice Reed, "forbids discrimination, whether forthright or ingenious." (p. 455)

More recently in *State Tax Commission of Utah v. Aldrich*, 316 U. S. 174, 182 (1942), Mr. Justice Frankfurter in a concurring opinion stated:

> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, § 10 [2]; (2) no State can, without the consent of Congress, lay any tonnage duties, Art. I, § 10 [3]; and (3) ***by virtue of the Commerce Clause, Art. I, § 8 [3], no State can tax so as to discriminate against interstate commerce.***"

See also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 45, 48 (1940), where the present Chief

Justice in summarizing what taxes were permissible and what not under the commerce clause said:

> "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states." (p. 45). . . .
>
> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce." (p. 48)

In *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 185 (1938), Mr. Chief Justice Stone made the following pertinent statement when considering the constitutionality of a South Carolina statute which regulated the weight of motor trucks, which statute was deemed a valid exercise of the state's police power:

> *"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have*

recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. Robbins v. Shelby County Taxing District, 120 U. S. 489, 498; Caldwell v. North Carolina, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See Gibbons v. Ogden, 9 Wheat. 1, 187; Brown v. Maryland, 12 Wheat. 419, 438-439; Cooley v. Board of Port Wardens, supra . . ." (Italics ours.)

In *Southern Pacific Company v. State of Arizona,* — U. S. —, 65 Sup. Ct. 1515 (1945), a case involving the constitutionality of an Arizona statute which limited the number of passenger and freight cars on trains operating in that state, Mr. Justice Douglas stated:

> "My view has been that the court should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted." (p. 1532.)

Mr. Justice Black in his dissent in *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434, 455 (1939), a case involving the constitutionality of a Washington state tax measured by the gross receipts of the taxpayer from his business of marketing fruit shipped from the state to places of sale in other states, stated:

> "I would return to the rule that—*except for state acts designed to impose discriminatory burdens on interstate commerce* because it *is* interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.'" (Italics ours.)

While it may be argued that the tax is not a burden upon interstate commerce and not discriminatory by reason

of the fact that the tax has been in effect for a number of years and the Appellant has been able to do an expanding business notwithstanding the fact, such argument is not an answer to the unconstitutionality of the statute. As stated in *In re: Insurance Tax Cases*, 160 Kans. 300, 326, 161 P. (2d) 726, 742 (1945) (dissenting opinion):

> "Certainly a discriminatory burden imposed upon only one of two competitors does not cease to be discriminatory merely because he is able to bear it and even to do well in spite of it. Either he must do business on a narrower margin, or compensate by some cut in operating cost, or by some added inducement manage to pass the burden on to his customer. *Equality of treatment is the test, and not whether a competitor can manage to do business and even prosper in spite of inequality.*
>
> "In this connection it is suggested in the court's opinion that in any event the tax cannot be regarded as a burden upon the plaintiffs because they doubtless take it into account in fixing the premiums and thus pass on to the policyholders whatever burden results from the tax. It is said in the opinion that if the state concludes to exact an indirect tax upon the holders of insurance policies in this manner, for revenue purposes, no reason appears why that cannot be done. The fact that the plaintiffs may be able to pass the burden on to policyholders in Kansas in no way answers the issue of discrimination, under the law. If it did, any discrimination against an interstate competitor would cease to be discrimination if it could be shown that he had succeeded in making his customers bear the burden." (Italics ours.)

Hence, there can be no doubt that the premium tax statutes (Sections 7948 and 7949 of the Code of Laws of South Carolina) are unconstitutional because they in fact discriminate against Appellant's interstate insurance business in South Carolina.

III. SECTIONS 7948 AND 7949 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1942, ARE NOT OFFSET BY ANY CORRESPONDING OR CORRELATIVE TAX OR TAXES NOR CAN THEY BE SUSTAINED AS A PRIVILEGE TAX.

(*Assignments of Error Nos. 2, 8, 9, and 10*)

A. THE PREMIUM TAXES ARE NOT OFFSET BY ANY CORRESPONDING OR CORRELATIVE TAX OR TAXES.

The Supreme Court of South Carolina has indicated in its opinion that the premium tax may not be discriminatory since it says:

> "It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax . . . may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a 'foreign' company, such as petitioner, and in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies It does not appear in the record whether the state of New Jersey, has a similar license tax to that of South Carolina (applicable to our and other non-resident insurance companies which may do business there) to which

petitioner now objects, but the tax is not at all uncommon among the states. Annotations, 49 ALR 726, 77 ALR 1490 and 83 ALR 464." (R. 22.)

In answer thereto, Appellant states:

(1) The Supreme Court of the State of South Carolina was foreclosed by the pleadings, and this Court should consider itself foreclosed, from consideration of possible corresponding or correlative taxes;

(2) Even if the question of correlative taxes is open for consideration, the Supreme Court of South Carolina's statement of the facts with respect thereto is contrary to the undisputed evidence;

(3) None of the taxes referred to by the Supreme Court of South Carolina as possible offsetting burdens are actually corresponding or correlative taxes; and

(4) The actual figures in the record with respect to the amount of such taxes demonstrate conclusively that they are insignificant as offsetting factors.

Taking up each of these points separately:

(1) The Supreme Court of the State of South Carolina was foreclosed by the pleadings, and this Court should consider itself foreclosed, from the consideration of any possible corresponding or correlative taxes.

In paragraph twelve of the Petition for Injunction and Equitable Relief it is alleged, after setting forth the premium taxes imposed upon foreign companies, that "there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of". (R. 6)

The Insurance Commission has not denied this allegation in his return, and hence, it can and should be considered as admitted.

(2) Even if the question of correlative taxes is open for consideration, the Supreme Court of South Carolina's statement of the facts with respect thereto is contrary to the undisputed evidence.

In the excerpt from the opinion above-quoted, the Court states that the figures shown in Column 5 of Exhibit A to the Petition (set forth on page 10 of the Record and page 8 hereof) "confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.—taxes of a nature which petitioner pays none here which correspond". (R. 22). This is not correct. The figures shown in Column 5 of Exhibit A do include all taxes paid both by the domestic insurance companies and the Appellant, except real estate taxes. Furthermore, the Appellant is subject to all types of taxes in the State of South Carolina to which domestic insurance companies are subject and, in addition, is required to pay the discriminatory premium taxes herein complained of.

While this Court pays great deference to facts found by a state court, as stated by Mr. Chief Justice Stone in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 659 (1945),

> "When the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. *Kansas City Southern R. Co. v. Albers Commission Co.*, 223 U. S. 573, 591; *Truax v. Corrigan*, 257 U. S. 312, 325; *First National Bank v. Hartford*, 273 U. S. 548, 552, and cases cited; *Fiske v. Kansas*, 274 U. S. 380, 385-386; *Norris v. Alabama*, 294 U. S. 587, 589-590."

(3) None of the taxes referred to by the Supreme Court of South Carolina as possible offsetting burdens are actually corresponding or correlative taxes.

It is well established that only corresponding or correlative taxes may be considered in determining whether discrimination in fact exists under a state tax statute.

In *Hinson v. Lott*, 8 Wall. 148 (1868), this Court considered the constitutionality of an Alabama statute which imposed a tax of fifty cents per gallon on whiskey imported for sale in Alabama even though the sale was made in the original package. The Court held that the commerce clause was not violated since there was a corresponding tax of fifty cents per gallon on whiskey manufactured within the state. In other words, for such a statute to be non-discriminatory the other taxes which would eliminate the discrimination of what would otherwise be a discriminatory tax must be "complementary" to the tax under consideration, or, as Mr. Justice Miller expressed it, the tax merely subjects the interstate commerce "to the same rate of taxation which similar articles pay that are manufactured within the State."

See also *Woodruff v. Parham*, 8 Wall. 123 (1868).

Likewise in *Henneford v. Silas Mason Co., Inc.*, 300 U. S. 577 (1937), this Court held constitutional a use tax which the State of Washington imposed upon the use in Washington of products purchased outside the state. The tax was equal to the sales tax which was imposed upon intrastate sales of such commodities in Washington. Since the use tax was complementary to the sales tax, the use tax was considered non-discriminatory. As Mr. Justice Cardozo stated, "Equality is the theme that runs through all the sections of the statute." That theme is entirely lacking in Sections 7948 and 7949 of the South Carolina Code of Laws now under review, since domestic insurance companies pay no premium taxes.

In *Best & Company, Inc. v. Maxwell*, 311 U. S. 454 (1940), Mr. Justice Reed stated on page 456:

"The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of $1 per annum for the privilege of doing business."

Foreign companies as well as domestic companies are subject to *ad valorem* property taxes on their real estate and tangible property within the state, but such taxes are not corresponding or correlative taxes in determining whether discrimination exists against interstate commerce. Otherwise this Court would undoubtedly have considered them in the *Best & Company, Inc.*, case.

Ad valorem taxes on tangible property are imposed in return for the protection and benefits accorded its owner by the state. *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194 (1905). They bear no relationship to the conduct of a business of insurance like the "premium tax" does. Nor do real estate taxes necessarily bear any relation to the business of insurance, for some companies may own much real estate and others very little and still conduct the same amount of insurance business in a state. Moreover, both foreign and domestic companies must pay real estate taxes on the real estate owned in South Carolina as well as *ad valorem* taxes on tangible personal property. The Appellant is not exempt from this taxation, but, as set forth in the aforesaid Schedule, it paid in South Carolina in 1944 *ad valorem* taxes in the amount of $3,103.92. Like the South Carolina domestic companies, the Appellant pays similar taxes in its home state of New Jersey. *Ad valorem* taxes should not be considered in determining the question of discrimination.

The Supreme Court of South Carolina, therefore, erred in stating that *ad valorem* property taxes paid by domestic insurance companies would offset the discrimination apparent on the face of Sections 7948 and 7949 so as to make the taxes under these sections non-discriminatory.

While other taxing statutes may be considered in determining whether in fact discrimination exists, as in *General American Tank Car Corp. v. Day*, 270 U. S. 367 (1926),

and *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245 (1928), the taxing statutes must be complementary one to the other in that each is a part of a statutory plan of taxation. No such taxing statutes exist in South Carolina.

(4) The actual figures in the record with respect to the amount of such taxes demonstrate conclusively that they are insignificant as offsetting factors.

The following table shows all the taxes of all types imposed in South Carolina upon the insurance companies named in Exhibit A.

	Column 1 1944 South Carolina Premiums Column #1 Schedule T Life and Casualty
The Prudential Company of America	$ 876,305.61
Liberty Life Ins. Co.	6,164,600.50
Carolina Life Ins. Co.	2,028,153.03
Atlantic Coast Life Insurance Company	1,182,037.72
Palmetto State Life Insurance Company	1,060,275.58
Capitol Life and Health Insurance Company	783,675.84

(See footnote 5.)

5. All the figures shown in the foregoing table are taken from the pleadings in the case except Column 3, the real estate taxes. The question of real estate taxes was raised by the Supreme Court of South Carolina, and in order that all of the facts with reference thereto should be in the record, the Appellant promptly presented to that Court a motion for an order permitting Appellant to file a statement of the real estate taxes paid in South Carolina by the aforesaid five South Carolina domestic insurance companies. That motion set forth the figures set forth in Column 3 but the Supreme Court erroneously denied that motion.

Column 2	Column 3	Column 4	Column 5
All Taxes Other Than Real Estate	Real Estate Taxes	Total of Column 2 and Column 3	Percentage of Column 4 to Column 1
$22,780.86	$ —0—	$22,780.86	2.6%
13,178.40[6]	4,151.02	17,329.42	0.3
12,171.75[6]	6,486.92	18,658.67	0.9
1,618.35	6,506.49	8,124.84	0.7
5,960.30	3,258.11	9,218.41	0.9
2,975.18	1,162.23	4,137.41	0.5

6. Note should be taken of the large amount of "other taxes" paid by these two South Carolina domestic companies. As it is known that these two companies do a substantial business outside of South Carolina, it would appear that a considerable portion of these "other taxes" are really paid to states other than South Carolina—and may possibly be premium taxes in other states.

The mere reference to and analysis of the above table demonstrates beyond question that even giving full effect to every tax, whether considered as corresponding, correlative or otherwise, the discrimination against the appellant is overwhelming.

B. SECTIONS 7948 AND 7949 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1942, ARE NOT PRIVILEGE TAXES.

We have stated that the sole issue in the case is the power of South Carolina to discriminate against interstate commerce. We should, however, call the Court's attention to an additional issue arising out of the following allegation in Paragraph Third of Appellee's Return to the Rule to Show Cause:

> "All foreign insurance companies, as a class, are required to pay the tax on premiums collected in this state. The State, in the exercise of its police power, placed said tax upon the petitioner and all other foreign insurance companies as a prerequisite to extending to them the privilege of doing business in this State. Without the payment of this excise tax the petitioner is without authority to conduct any business within the State of South Carolina." (R. 14.)

and in Paragraph Fourth it is alleged that the tax is assessed:

> "as a condition precedent to their being permitted to conduct an insurance business within the State." (R. 15.)

The Supreme Court of South Carolina evidently adopts with approval this construction of the South Carolina premium tax statutes as is indicated by its discussion of the rule stated in the leading case of *Crutcher v. Kentucky*, 141 U. S. 47 (1891) (beginning at R. 26). The Supreme Court of South Carolina is clearly in error because the right to carry on interstate commerce is not a franchise or privilege which may be granted or withheld by a state and no

state may levy a tax upon the exercise of such privilege. *Crutcher v. Kentucky*, 141 U. S. 47 (1891); *Western Union Telegraph Company v. Kansas*, 216 U. S. 1 (1910); *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282 (1921); *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90 (1937); *Fisher's Blend Station, Inc., v. State Tax Commission*, 297 U. S. 650 (1936).

IV. THE McCARRAN-FERGUSON ACT WAS NOT INTENDED TO PERMIT, NOR COULD IT VALIDLY PERMIT, DISCRIMINATORY REGULATION OR TAXATION OF INTERSTATE COMMERCE.

(Assignments of Error Nos. 4, 5, 6, 7 and 10)

Subsequent to the decision of the *South-Eastern Underwriters* case, Congress enacted the McCarran-Ferguson Act of March 9, 1945, c. 20, 59 Stat. 34; 15 U. S. C. A. §§ 1011-1015. The pertinent provisions of this Act are:

> "Sec. 1. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."
>
> "Sec. 2 (b) "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance: . . ."

Although the Supreme Court of South Carolina held in this case that the South Carolina premium tax law is

neither a burden upon interstate commerce nor discriminatory against a foreign insurance company, it further erroneously construed the above Act as a cure-all for the invalidity, if any, of its state premium tax statutes and held that, without more, the McCarran-Ferguson Act would enable the state to continue to levy the discriminatory tax against the interstate commerce of the Appellant.

A consideration of the Act, the circumstances surrounding its enactment, and the decisions of this Court with respect to the "Silence of Congress Doctrine" and "Congressional Consent Doctrine" show that the McCarran-Ferguson Act was not intended to and does not in terms authorize burdensome and discriminatory taxation or regulation of insurance companies by the several states.

What were the circumstances which attended the enactment of the McCarran Act?

> "By the Southeastern decision—which was described in the report of the Judiciary Committee of the United States Senate as a 'precedent-smashing decision'—the Supreme Court held that the business of insurance is not only commerce but, as conducted by the larger companies, it is *interstate commerce*, and therefore subject to Federal regulation; also, that since the Sherman Act is framed in general terms and carries no provision exempting it, insurance business is subject to its prohibitions and penalties. In order to allay alarm and lessen confusion as to the effect of the decision, the McCarran Act was passed. Obviously congress could not overrule the finding that such insurance business constitutes interstate commerce. That question is for judicial and not for legislative determination. But congress could determine to what extent the field should be entered by the federal government." *In re Insurance Tax Cases*, 160 Kans. 300, 329, 161 P. (2d) 726, 743 (1945) (dissenting opinion).

Senator McCarran, the sponsor of the bill, stated in the course of the proceedings on the bill:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, *subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court*, as, for instance, in Allegeyer v. Louisiana (165 U. S. 578); St. Louis Cotton Compress Co. v. Arkansas (260 U. S. 346); and Connecticut General Insurance Co. v. Johnson (303 U. S. 77)." (Italics ours.) 91 Cong. Rec., Feb. 26, 1945, at 1471.

Senator McCarran, it will be noted, stated that continued regulation and taxation by the states should be "subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court." The decisions cited by way of illustration involved the invalidation of state laws affecting insurance operations under the "due process" clause of the Fourteenth Amendment.

Inasmuch as the decisions of this Court relative to the validity of state taxation under the commerce clause became, upon the rendition of the *South-Eastern Underwriters* decision, controlling decisions bearing upon the continued regulation and taxation of insurance companies by the states, presumably it was the intention of the sponsors of the bill that the decisions of this Court should likewise be recognized in the continued exercise of the taxing and regulatory powers of the states.

Senator O'Mahoney, another proponent of the bill, stated that the bill was not intended to "delegate to any State the power to legislate in the field of interstate and foreign commerce," and that the Conference Report "would give to the States, to the Congress and to industry the opportunity so to adjust the laws and insurance practices as to

bring clarity into the whole situation * * * an invitation to the States to legislate in good faith." 91 Cong. Rec., Feb. 27, 1945, at 1554 and 1557.

The Act.

What does the Act state?

The pertinent provisions have been fully set forth, *supra*. Analyzing its provisions, we fail to see any intention on the part of Congress, either expressed or implied, to validate, authorize, or sanction state statutes which discriminate against interstate commerce. The manifest purpose of the Act was to permit the states to continue with such regulation and taxation of the business of insurance as was constitutional and was not discriminatory against interstate commerce. In other words, Congress by the enactment of the McCarran-Ferguson Act intended to remove any question as to the validity of non-discriminatory state regulation and taxation which under the so-called "Silence of Congress Doctrine" might otherwise be deemed invalid.

The Silence of Congress and Congressional Consent Doctrines.

The doctrine commonly known as Silence of Congress stands for the proposition that if Congress has not legislated concerning a matter of local concern which incidentally affects interstate commerce, then that matter may be regulated by the several States, subject only to being superseded by Congressional legislation; but, if the matter is of national concern and such as to require uniform regulation, then that matter shall be regulated exclusively by Congress.

The McCarran-Ferguson Act, as stated in Section 1, was enacted so as to permit "the continued regulation and taxation by the several States of the business of insurance" and also to preclude "silence on the part of Congress" to be "construed to impose any barrier to the regulation or taxation of such business by the several States".

We are of the opinion that what Congress intended to say in the McCarran-Ferguson Act was that its silence or failure to regulate the interstate insurance business was not to be taken as meaning that the business should be free from all regulation or taxation by the several states. To make its meaning doubly clear Congress provided in Section 2 (a) "that the business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business," that is, regulation and taxation which did neither impose an undue burden on interstate commerce nor discriminate against the interstate business of foreign insurance companies.

The cases concerning the doctrine of Silence of Congress and those concerning Congressional Consent support that construction of the McCarran-Ferguson Act.

The first and one of the leading cases on this subject is *Cooley v. Wardens of the Port of Philadelphia,* 12 How. 299 (1851). The question in that case involved the validity of a statute of Pennsylvania which required certain ships, sailing from or bound to ports not within the Delaware River, to receive a pilot, and imposing penalties upon the master of any vessel who failed to take a pilot. It was contended that this act was a regulation of commerce and, therefore, void. From the adoption of the Constitution similar statutes enacted by the states had been in existence and had been enforced; and Congress, shortly after the adoption of the Constitution, had enacted in 1789 a statute declaring that all pilots in the harbors, rivers and ports of the United States should continue to be regulated in conformity with the existing laws of the states where such pilots might be, or with such laws as the states might thereafter enact for the purpose, until further legislative provision should be made by Congress. The Court stated that if, under the Constitution, Congress had exclusive power to regulate the subject of pilotage, it was without power to permit the states to make such regulations; but that if the regulation of pilotage, while affecting interstate commerce

and within the power of Congress, was a matter of local concern, the subject could be regulated by the states. The Court held the regulation was of the latter character, and it was upheld.

The Court, in its decision, concluded: (1) That matters of local concern which incidentally affect interstate commerce may still be regulated by the states, although such regulation may be superseded by Congressional regulation; (2) That if the nature of the subject was such as to require uniform regulations, that is, of national concern, the power to regulate was exclusive in Congress and did not reside in the states, whether or not Congress had legislated on the subject; and (3) That Congress has no power to grant to the states any legislative power which had been surrendered by them and granted exclusively to Congress.

The mooted questions which followed this decision were whether a subject was "national" or "local" in nature and then whether the question should be determined by Congress or the courts. Whatever the correct view may be on the latter question, it is clear from the decision that the matter of the "silence of Congress" came to have significance because of the distinction as to whether subjects of regulation were national or local in nature. In the former case, the courts thereafter held that the states could not interfere at all, even in the silence of Congress, while, in the latter, the state might exercise a regulatory power so as to affect interstate commerce, until Congress had occupied the field.

Thus, in *Welton v. The State of Missouri*, 91 U. S. 275, 282 (1875) the Court in holding invalid a Missouri tax on vendors of foreign-made goods, stated:

> "Its (Congress') inaction on this subject . . . is equivalent to a declaration that the inter-State commerce shall be free and untrammeled."

Similarly, in *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493 (1887) the Court said:

> "That where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom."

Complementary to the Silence of Congress Doctrine is the doctrine which has been designated as Congressional Consent. What is the effect of congressional action where Congress, instead of remaining silent, has endeavored to consent to regulation and taxation by the several states? That question is squarely raised in this case because of the Congressional consent referred to in the McCarran-Ferguson Act. Was not that Act intended only to permit the states to legislate in connection with the regulation and taxation of insurance companies provided such legislation did not burden or discriminate against the interstate business of those companies?

The principal litigation in connection with this body of law has arisen from congressional statutes designed to enable the states to legislate in a fashion otherwise judicially denied to them. The Wilson Act,[7] the Lacey Act,[8] the Hawes-Cooper Act,[9] the Renovated Butter Act,[10] the Webb-Kenyon Act [11] and the Ashurst-Sumners Act [12] were passed for that purpose.

A review of some of the decisions construing these Acts may be helpful.

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7. Wilson Act, Act of August 8, 1890, c. 728, 26 Stat. 313; 27 U. S. C. A. § 121.

8. Lacey Act, Act of May 25, 1900, c. 553, § 5, 31 Stat. 188; 18 U. S. C. A. § 395.

9. Hawes-Cooper Act, Act of January 19, 1929, c. 79, §§ 1, 2, 45 Stat. 1084; 49 U. S. C. A. § 60.

10. Renovated-Butter Act, Act of May 9, 1902, c. 784, § 1, 32 Stat. 193; 21 U. S. C. A. § 25.

11. Webb-Kenyon Act, Act of March 1, 1913, c. 90, 37 Stat. 699; 27 U. S. C. A. § 122.

12. Ashurst-Sumners Act, Act of July 24, 1935, c. 412, § 1, 49 Stat. 494; 18 U. S. C. A. § 396b.

The first state prohibition laws to be construed by this Court involved the question of state power over interstate commerce during the "silence" of Congress. In *Leisy v. Hardin*, 135 U. S. 100, 124 (1890) the Court held invalid a state seizure of liquors under a state law as applied to liquors which were still in interstate commerce and that up to the time of sale "in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

Within a short time thereafter, Congress, by the passage of the Wilson Act subjected liquor coming into a state for sale, storage, or use, to the operation of state laws, even though in the original packages. This Act was held valid in *In re Rahrer*, 140 U. S. 545 (1891).

Later, in *Rhodes v. Iowa*, 170 U. S. 412 (1898) the Court held that the Wilson Act was not intended to permit a state to exclude incoming shipment of intoxicating liquor. Possibly because of the doubt that a federal law permitting the states to forbid the introduction of liquor would be constitutional, the Webb-Kenyon Act was passed, taking the form of a statute prohibiting the shipment of intoxicating liquors into a state for use in contravention of its laws. This law was held to validate state laws prohibiting the shipment of intoxicating liquor into the state, thus settling the issue in *Rhodes v. Iowa, supra*, and establishing the proposition that Congress does have *some* power to remove from the states disabilities which, in the absence of congressional action, inhibit the states in the regulation of interstate commerce. *Clark Distilling Company v. Western Maryland Railway Company*, and *State of West Virginia*, 242 U. S. 311 (1917).

The Hawes-Cooper Act which subjected prison-made goods in their original packages to the operation of state laws on their coming to rest in the state was upheld in *Whitfield v. State of Ohio*, 297 U. S. 431 (1936). This Act (which was similar to the Wilson Act which, as afore-

mentioned, was subsequently supplemented by the Webb-Kenyon Act) was also later supplemented by the so-called Ashurst-Sumners Act which latter Act was upheld in *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, 299 U. S. 334 (1937). In both of these cases reference was made to the fact that the state statutes were non-discriminatory, applying the same rule to goods in interstate commerce as applied to domestic goods. In the *Whitfield case* the Court said on page 439:

> "A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by *non-discriminating legislation*, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument." (Italics ours.)

In the *Kentucky Whip & Collar Co.* case the Court cited with approval the *Whitfield* case, saying on page 351:

> "The Court upheld the power of the State, so far as the Federal Constitution is concerned, to base *non-discriminatory legislation* upon that conception." (Italics ours.)

Not only were the statutes respecting prison-made goods non-discriminatory but the cases construing these statutes held that the subjection of such goods to the operation of state statutes did not result in the validation of the state statutes by reason of a delegation of power by Congress, but rather that the reserved police power of the state was broad enough in scope to apply to interstate goods. This broad power of the state was only qualified by the established rule that, in the absence of Congressional action, it might not be exercised so as to interfere with interstate commerce, since Congress by its silence impliedly indicates that such commerce must be free. As stated in *Whitfield v. State of Ohio, supra*, at page 441:

> "That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the state is made

clear by *In re Raher, supra*, pp. 560-561, and by what we have already said under subdivision 2."

International Shoe Co. v. State of Washington, — U. S. —, 66 Sup. Ct. 154 (1945) is the most recent case in which a statute dealing with Congressional consent was before this Court, to wit, the provision in Federal Unemployment Tax Act (Act of August 10, 1939, c. 666 § 613, 53 Stat. 1391; 26 U. S. C. A. § 1606 (a)) making state unemployment statutes applicable to persons engaged in interstate commerce.

While it was recognized in the *International Shoe Co.* case that states may be authorized to enact laws which regulate and effect interstate commerce, this Court went no further than to deny to interstate commerce an immunity not enjoyed by local enterprise. In other words, like the statutes concerning liquor and convict made goods, the purpose of Congress was confined to preventing discrimination *in favor* of interstate commerce. The case, therefore, cannot be taken to mean that Congressional consent in general terms is ever to be construed as authorizing state discrimination *against* interstate commerce or that explicit Congressional sanction of state discrimination against interstate commerce is constitutionally warranted.

Other enabling acts of Congress are of little, if any, assistance except to show the fields covered by such legislation. They shed no helpful light on the question herein presented. See the acts respecting the sale of oleomargarine, the transportation of diseased plants (Plant Quarantine Act, Act of April 13, 1926, c. 135, 44 Stat. 250; 7 U. S. C. A. § 161), the transportation of black bass (Act of July 2, 1930, c. 801, 46 Stat. 845; 16 U. S. C. A. § 852) and of prize fight films (Act of June 29, 1940, c. 443, 54 Stat. 686; 15 U. S. C. A. § 1001).

However, from the cases construing statutes which are analogous in that they involve Congressional consent, it is apparent that these statutes did not and do not delegate to the states the right to discriminate against interstate com-

merce, nor are they otherwise violative of the Constitution. On the contrary they in effect constitute regulations by Congress designed to prevent the frustration of valid state *police* regulations through the use of instrumentalities of interstate commerce. In other words, Congress by these statutes removed restrictions on the reserve state police power of the states which might be urged from its silence on that subject matter but in so doing it was not attempting to delegate to the states the right to enact legislation contrary to provisions of the Constitution of the United States, and more particularly the commerce clause of that great document.

The cases furthermore establish the principle that Congress, even if it had intended to do so, could not have invested the states with the power to discriminate against interstate commerce, whether through regulation or taxation. The states were deprived of that power by virtue of the commerce clause itself. *Cooley v. Wardens of the Port of Philadelphia, supra,* established that Congress cannot increase the powers of a state, the Court saying on page 318 thereof:

> "If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate."

In the light of these cases, it is obvious that what Congress was attempting to do in the McCarran-Ferguson Act was to nullify any attempt to construe its "silence" with respect to the interstate business of insurance as an indication on its part that such business should be entirely free from state regulation or taxation. In no prior case has Congress attempted to "construe" its silence, and it is questionable whether its silence is broken by an attempt to put a construction on it. In any event, the text of the Act shows that, at most, it is intended that the "silence" doctrine should not be invoked to strike down continued constitutional regulation by the states. The Act, however, falls

far short of indicating a purpose to sanction discriminatory taxation of interstate commerce in violation of the Constitution.

Scott v. Donald, 165 U. S. 58 (1897) is authority for the construction here urged of the McCarran-Ferguson Act. In that case, the Court held invalid a South Carolina statute which provided in substance that all liquor within the state should be considered contraband, seized, and turned over to a state commissioner who, in turn, was authorized to purchase and dispose of the same through state dispensers, and who was solely authorized to import liquor into the state. This statute was sought to be upheld by virtue of the Wilson Act, which subjected intoxicating liquors imported into a state for use, consumption or storage, on their arrival to the operation and effect of the police powers of the state to the same extent as though produced therein. The Court stated that the Wilson Act was "not intended to confer on any State the power to discriminate injuriously against the products of other States," whose manufacture and use in South Carolina was not forbidden. The state, it said, under the act of Congress could forbid entirely the manufacture or sale of intoxicating liquors, or provide equal regulations for its sale, but, it stated:

> ". . . the State cannot, under the Congressional legislation referred to, establish a system which, in effect, *discriminates* between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." (p. 100.) (Italics ours.)

Thus, following the decision in the *South-Eastern Underwriters* case, Congress had three alternative courses: (a) to take over completely the regulation and taxation of the insurance business; or (b) to do nothing, thereby permitting the inference to be drawn from its silence that all regulation and taxation by the states was forbidden; or (c) to permit regulation and taxation of the business to be continued as in the past, when not beyond constitutional bounds.

To say that Congress, unless it intended to take the third course, did an entirely futile thing, is to deny the existence of the second alternative, which the Act proclaims.

Justice Hoch, in his dissenting opinion in *In re Insurance Tax Cases*, 160 Kans. 300, 329, 161 P. (2d) 726, 743 (1945), has very clearly expressed what the McCarran-Ferguson Act actually did:

> "What, then, did the McCarran Act do? First, as to the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, it provided that they should be applicable, after January 1, 1948, to the business of insurance 'to the extent that such business is not regulated by state laws;' that until January 1, 1948, such acts and 'the Robinson-Patman Anti-discrimination Act should not apply to the insurance business,' but that these provisions should not render the Sherman Act inapplicable 'to any agreement to boycott, coerce, or intimidate.' Further, that no federal act should be construed to invalidate or impair any state regulatory or tax law with reference to the business of insurance unless such federal act 'specifically relates to the business of insurance.' All these and one or two other such provisions were, in effect, simply amendments to the various federal acts which congress, of course, had power to make. They wrote into the federal acts exceptions or provisos, the absence of which in the Sherman Act had been noted in the Southeastern opinion. They thus clarified the scope of existing federal law. In further declaration that congress had not otherwise entered the insurance field now opened to it, it was said in the McCarran Act that 'the continued regulation and taxation by the several states of the business of insurance is in the public interest,' and that 'the business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business.' This was a reassuring expression of the congressional attitude

and intention, but it certainly did not delegate to the states—and could not do so—any power which they did not already have. ***It is elementary that the dividing line between state and federal power is fixed in the constitution, as construed by the Supreme Court. If congress could alter that line at will it could by statute nullify the constitution.*** Assuredly congress did not mean to say by the McCarran Act that a state might now impose discriminatory burdens upon interstate commerce or contravene any of the constitutional guaranties. If it had attempted any such thing its effort would, of course, have been futile. In the McCarran Act congress has now clearly said that, except to the extent indicated, it has not entered the field of insurance regulation. And no regulatory state law is now threatened with the contention that it conflicts with federal regulation. Nor is any such state law in danger, *provided, always,* that it does not exceed constitutional limits as judicially determined. I have no notion that the able men who framed the McCarran Act were foolishly saying to the states that as far as the insurance business is concerned they might now pass a discriminatory or otherwise *unconstitutional* statute if they desired to do so." (Italics ours.)

It seems clear, therefore, that silence of Congress, if the McCarran-Ferguson Act had not been passed, might have been construed to prohibit all regulation and taxation of the business of insurance, but, inasmuch as Congress has broken its silence so as to permit regulation and taxation to be continued as in the past, the construction of the Act which allows a field for the operation of *state laws which are not beyond constitutional bounds* is proper and furthermore it avoids a conclusion which would render the Act invalid. A construction raising a constitutional question has always been avoided by the courts: *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *United States v. Standard Brewery Co.*, 251 U. S. 210, 220

(1920); *United States v. LaFranca*, 282 U. S. 568, 574 (1931).

If we assume that the McCarran-Ferguson Act was intended to permit discrimination and that Congress had the power to authorize the states to pass legislation which discriminates against interstate commerce (propositions which we most emphatically deny), it would still have been necessary for the South Carolina legislature to have reenacted Sections 7948 and 7949, or enacted a new statute after the passage of the McCarran-Ferguson Act, in order to make the gross premium taxes applicable in this proceeding. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, being unconstitutional, were null and void and in legal contemplation the same as though they had never been passed. As stated by this Court in *Chicago, Indianapolis & Louisville Railway Company v. Hackett*, 228 U. S. 559, 566 (1913):

> "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law. *Norton v. Shelby County*, 118 U. S. 425, 442; *Ex parte Siebold*, 100 U. S. 371, 376."

Obviously, Congress is without power to revive a void state statute, and Sections 7948 and 7949, not having been reënacted, are still null and void and of no effect.

The McCarran-Ferguson Act, if construed to permit discrimination, would be invalid.

If the McCarran-Ferguson Act could be construed to permit discrimination, the question of its validity would depend upon the right of Congress either (1) to adopt the legislation of the several states or (2) to consent to discriminatory state legislation.

A mere statement of the first proposition reveals its fallacy and untenability. Such construction is inconsistent

with the principle that an act, if possible, should be construed so as to be constitutional. If it be assumed that the McCarran-Ferguson Act is an adoption by Congress of legislation of the states, then the Act is unconstitutional (1) as a violation of the due process clause of Fifth Amendment to the Constitution, (2) as a violation of Article I, Section 8, Clause 1 of the Constitution which requires that excises shall be uniform throughout the United States in the exercise by Congress of its taxing power, (3) as a violation of Article I, Section 1 of the Constitution which requires legislation to be enacted by Congress, and (4) as a violation of the states' power to tax for purposes of raising revenue *for their own use,* which power is vested exclusively in the states.

Congress does not have the power to consent to state discriminatory legislation against interstate commerce.

That has been the ruling of this Court in cases involving state statutes which discriminate against interstate commerce. Such legislation is beyond congressional consent.

In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 522 (1935), the Court said:

> "Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Co. v. Pigg*, 217 U. S. 91, 112."

In *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498 (1887), a Tennessee statute was declared unconstitutional which required drummers to pay a tax for the privilege of soliciting the sale of goods of firms doing business in other states. The Court said:

"This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. . . . It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that lead to it.

"If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And *Congress alone can do it;* for it is obvious that such regulations should be based on a uniform system applicable to the whole country and not left to the varied, discordant, or retaliatory enactments of forty different states." (Italics ours.)

In *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 185 (1938), the present Chief Justice made the following pertinent statement when considering the constitutionality of a South Carolina statute which regulated the weight of motor trucks, which statute was deemed a valid exercise of the state's police power:

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without

> *the state.* Robbins v. Shelby County Taxing District, 120 U. S. 489, 498; Caldwell v. North Carolina, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See Gibbons v. Ogden, 9 Wheat. 1, 187; Brown v. Maryland, 12 Wheat. 419, 438-439; Cooley v. Board of Port Wardens, supra; . . ." (Italics ours.)

This interpretation of the commerce clause denying the right of the states to legislate discriminatorily against interstate commerce finds further support from recent expressions by several present members of this Court.

In *Southern Pacific Company v. State of Arizona,* — U. S. —, 65 Sup. Ct. 1515 (1945), a case involving the constitutionality of an Arizona statute which limited the number of passenger and freight cars on trains operating in that state, Mr. Justice Douglas stated:

> "My view has been that the court should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted." (p. 1552.)

Mr. Justice Black in his dissent in *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434, 455 (1939), a case involving the constitutionality of a Washington state tax measured by the gross receipts of the taxpayer from his business of marketing fruit shipped from the state to places of sale in other states, stated:

> "I would return to the rule that—*except for state acts designed to impose discriminatory burdens on interstate commerce* because it *is* interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.' " (Italics ours.)

In *State Tax Commission of Utah v. Aldrich, et al.,* 316 U. S. 174 (1942), Mr. Justice Frankfurter, in a concurring

opinion upholding the application of a Utah inheritance tax law to a non-resident owner of stock of a Utah corporation in summarizing the limitations upon state taxing power state:

> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: . . . (3) by virtue of the Commerce Clause, Art. 1, § 8, [3], *no state can tax so as to discriminate against interstate commerce.*" (p. 182.) (Italics ours.)

This Court's attention is also called to the fact (as set forth on pages 8, 9 and 11 of Appellant's Statement as to Jurisdiction) that as of January 1, 1945, twenty-eight states had in force "premium tax statutes" which, like South Carolina's statute, placed a burden upon and discriminated against interstate commerce. Subsequently twelve [13] of the twenty-eight states (whose statutes were discriminatory in Appellant's opinion) have recently enacted legislation which either completely or practically eliminated the discrimination and three states [14] have enacted legislation which purports to eliminate discrimination but, in the opinion of the Appellant, do not do so. It is, therefore, evident that these states through their legislatures have impliedly acknowledged the unconstitutionality of their previous "premium tax" statutes and of the fact that the McCarran-Ferguson Act never was intended to validate discriminatory "premium tax" statutes. At the present time only sixteen states have discriminatory statutes.

The McCarran-Ferguson Act surely was not intended to permit, nor could it validly permit, discriminatory regulation or taxation of interstate commerce. It was merely intended to remove any question as to the validity of proper and non-discriminatory state regulation and taxation which

13. Arizona, Arkansas, Iowa, Maine, Missouri, New Hampshire, New Mexico, Oregon, South Dakota, Tennessee, Washington and West Virginia.
14. Florida, Oklahoma and Texas.

under the "Silence of Congress Doctrine" might otherwise be deemed invalid and clearly was not intended (nor could Congress have constitutionally done so if it desired) to authorize state legislation which discriminates against the interstate commerce of foreign insurance companies and in favor of local commerce of domestic companies.

CONCLUSION.

This case presents the important constitutional problem whether interstate commerce shall be taxed and regulated by the states on the basis of equality with domestic commerce or whether interstate commerce shall be subjected to all the evils of discrimination which the framers of the Constitution intended to eliminate by the commerce clause.

This Court has ruled in the *South-Eastern Underwriters* case that the business of insurance when transacted across state lines constitutes interstate commerce. The uncontradicted facts in this proceeding clearly establish that the Appellant's insurance business in South Carolina constitutes interstate commerce and that all of Appellant's activities are in furtherance of and incidental to its insurance business. It has also been established that the South Carolina "premium tax" statutes violate the commerce clause of the Constitution in that they illegally and unjustly discriminate against interstate commerce of Appellant and in favor of local commerce of South Carolina domestic insurance companies. The McCarran-Ferguson Act has not and cannot validate this unconstitutional state legislation. Not only has the legislature not reënacted these statutes, but, even if reënacted, the statutes would still be unconstitutional, because the McCarran-Ferguson Act was not intended to permit such regulation and taxation of interstate commerce, nor could that Act have constitutionally done so, even if Congress had evidenced such an intention.

The State of South Carolina has as such little real interest in the ultimate outcome of this case. Its revenue

system would not be interfered with if the statutes in question are held to be unconstitutional, since South Carolina could merely join the two-thirds of the states which tax foreign insurance companies on a non-discriminatory basis. The real beneficiaries of the discrimination are the owners of the domestic companies.

We, therefore, submit that the judgment of the Supreme Court of South Carolina should be reversed and that the prayer of the Appellant's Petition for Injunction and Equitable Relief should be granted.

Respectfully submitted,

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APPENDIX.

Sections 7948, 7949 of the Code of Laws of South Carolina, 1942, Volume 4, Chapter 157, Article 1. (pp. 594-596)

SECTION 7948. *Semi-annual license fees to be paid-returns of premiums collected.* In addition to the annual license fees now provided by law, the commissioner shall require each foreign life insurance company of any class licensed by him not incorporated under the laws of the State of South Carolina, except fraternal benefit orders operating under the grand lodge system, to pay as an additional and graded license fee an amount equal to two per centum on the total premiums, i. e., total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this State during the time the company has done business in this State since making last such return. Such returns shall be made under oath by an executive officer of the company: PROVIDED, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the reserve on all policies issued in South Carolina is invested in any or all of the following securities or property, to-wit: notes or bonds of the State of South Carolina or of counties or municipalities of the State or of sub-divisions thereof; or first mortgage bonds of real estate in this State; or first mortgage bonds of solvent domestic or domesticated corporations whose improved property is situate entirely within this State and which are owned and controlled independently of foreign corporations and operated entirely within the State; or average daily balance on deposits in banks of this State maintained continuously for six months next preceding date of such return; or any property situate within the State and returned for taxes therein, at the value at which it is returned, then, and in that case, the addi-

tional license fee on premiums collected during the time such investments have been actually made and maintained shall be one and three-fourths per centum; under like conditions, if said investments be one-half of said reserves, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said reserve, the additional license fee shall be one and one-fourth per centum, and if the entire reserve be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent. In addition to the annual license fee now provided by law, the insurance commissioner shall require each foreign fire insurance company, each foreign accident and health, each foreign casualty or surety company, and all other companies of any class licensed by him not incorporated under the laws of the State of South Carolina not hereinbefore specifically mentioned to pay as an additional and graded license fee an amount equal to two per cent. on the total premiums, i. e., total income or total receipts from the State, less return premiums for cancellation on risks in this State during the time the company has done business in this State since last such return. Such returns shall be made under oath by an executive officer of the company: PROVIDED, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the premium receipts on all risks in South Carolina is invested in the securities named in this section, then, and in that case, the additional license fee on premiums collected during the time such investments have been actually made and sustained shall be one and three-fourths per centum; under like conditions, if said investments be one-half of said premium receipts, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said premium receipts, the additional license fee shall be one and one-fourth per centum; if the entire premium receipts be so invested, under like conditions, the

additional license fee on said premium receipts shall be one per cent.: PROVIDED, FURTHER, that one-half of the said additional license fee collected under the terms of this section is allotted to the several counties, respectively, in proportion to said premiums collected in said counties, and the same is hereby appropriated to ordinary county purposes, and no additional license fee or county tax shall be levied on such companies. At the close of the semi-annual period, or as soon thereafter as possible, the insurance commissioner shall furnish the state treasurer a statement showing the amount of said premiums collected by each company in each of the several counties of the State, and the amount of additional license fees collected thereon; and the state treasurer, upon a warrant from the comptroller general, shall pay into the county treasurer of each county one-half of the additional license fee collected as aforesaid on the said premiums collected by each insurance company in that county: PROVIDED, that nothing in this article or any other article shall be construed as preventing any municipality from levying and collecting license fees or taxes in accordance with its ordinances. The return of said premium collections shall be made within thirty days after the 30th day of June and the 31st day of December of each year, and if the returns are not so made, the insurance commissioner may suspend the license of the company until such returns are made. The attorney general shall bring suit in the name of the State to collect any unpaid portion of license fees provided herein.

SECTION 7949. *Additional annual license fee.*—The Insurance Commissioner of South Carolina is hereby directed to require all insurance companies doing business in this State, including all domestic companies and all other companies of any class licensed by such insurance commissioner and not incorporated under the laws of South Carolina to pay, in addition to the annual license fee, now provided by law, a graduated license fee in an amount equal to one (1%) per cent of the total premiums collected in the State,

less return premiums for cancellation on risks: PROVIDED, that the terms hereof shall not apply to domestic insurance companies; and PROVIDED, FURTHER, that mutual fire insurance companies of other States, admitted to do business in this State, employing no agents, writing no business except on the property of its members, and doing business without profit shall pay annually on or before the first day of March, in addition to all other license fees which they are now required by law to pay, a graduated annual license fee in an amount equal to one (1%) per centum of the premiums and premium deposits and assessments collected by them in the State during the year ending on the thirty-first day of December next preceding, after deducting from such premiums and premium deposits and assessments the so-called dividends or unused or unabsorbed portion of the premiums and premium deposits and assessments applied or credited in part payment of such premiums or premium deposits and assessments or returned to policyholders in cash or otherwise during the year for which the said tax is computed.

The one (1%) per cent fee as provided for in the preceding paragraph shall be paid into the state treasury for state purposes, and the insurance commissioner of South Carolina is hereby required to collect said fee as other fees are collected and pay over to the state treasurer.

This section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws, but it is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for state purposes.